

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTONIO RIGBERTO FRAUSTO,

Defendant.

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8:08CR263

MEMORANDUM AND ORDER

This matter is before the court on the defendant's motion to vacate under [28 U.S.C. § 2255](#). Filing No. [76](#). Under Rule 4 of the *Rules Governing Section 2255 Proceedings for the United States District Courts*, the court must perform an initial review of the defendant's § 2255 motion. See *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 4(b) (2011 Ed.). The rules provide that unless "it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief," the court must order the United States Attorney to respond to the motion. *Id.*

The jury at trial found the defendant guilty in violation of [21 U.S.C. §§ 846, 841\(a\)\(1\)](#), and [841\(b\)\(1\)](#) for conspiracy to distribute five hundred (500) grams or more of methamphetamine mixture. Filing No. [76](#). The defendant was sentenced to 240 months of imprisonment. Filing No. [76](#). His sentence was affirmed on appeal. Filing No. [69](#). In his § 2255 motion, the defendant alleges that he received ineffective assistance of counsel for failure to adequately advise and guide the defendant on the acceptance or denial of the plea agreement and hearing, and for failure to strategize a sound and fundamental defense. Filing No. [76](#). The defendant also alleges that he received ineffective counsel

for failure to object to or challenge the credibility of his arrest, witnesses during trial, and evidence that was admitted into court. Filing No. [76](#).

On initial review, the court finds that it does not plainly appear that the defendant is entitled to no relief, and that the government should be required to answer. On receipt of the government's answer, the court will determine (a) whether to order the parties to submit briefs on the merits, so that the defendant claims may be resolved on the basis of the record and briefs, or (b) whether an evidentiary hearing is required. See *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 8(a) (2011 Ed.).

THEREFORE, IT IS ORDERED:

1. On initial review, the court finds that summary dismissal is not appropriate.
2. The United States shall file an answer to the defendant's § 2255 motion within 21 days of the date of this order. Filing No. [76](#).

DATED this 17th day of June, 2011.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States District Judge

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